UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

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| CARMEN NIEVES,<br><br>Plaintiff,<br><br>v.<br><br>UNIVERSAL SOLAR PRODUCTS, INC.,<br><br>Defendant. | Civil No. 07-2089 (JAF) |

**OPINION AND ORDER**

Plaintiff, Carmen Nieves, brings this diversity action against Defendant, Universal Solar Products, Inc., seeking damages and injunctive relief for sexual harassment, sex discrimination, and retaliation in violation of Puerto Rico Law No. 17, of April 22, 1988, 29 L.P.R.A. § 155-155j ("Law 17"), and Law No. 69, of July 6, 1985, 29 L.P.R.A. § 1321-41 ("Law 69"). Docket No. 60. Defendant moves for summary judgment. Docket No. 24. Plaintiff opposes, Docket No. 26, Defendant replies, Docket No. 62, and Plaintiff surreplies, Docket No. 64.

**I.**

**Factual and Procedural Synopsis**

We derive the following factual summary from the parties' motions, statements of material facts, and exhibits. Docket Nos. 24, 26, 27, 65, 68, 73.

From March 16 to May 11, 2005, Plaintiff sold Defendant's solar energy products door-to-door and at Defendant's booths in various malls in Puerto Rico. Prior to working as a salesperson for Defendant, Plaintiff worked in sales for other companies selling solar water heaters, liquid chemicals, and cemetery lots. Christopher Alers, a supervisor with Defendant, recruited Plaintiff to come work for Defendant.

Plaintiff filled out a job application to work for Defendant on March 16, 2005. Docket No. 65-2. On the same day, she also signed a sales contract for sale of Defendant's products. Id. The contract stated that "the existent relationship . . . is chiefly that of an independent contractor" and that "the sales representative shall not be considered an employee or agent of [Defendant]." Id. It provided that either party could terminate the sales contract with thirty days' notice. Id. It further stated that the sales person would be responsible for paying booth expenses. Id. However, Plaintiff maintains that Defendant provided an assigned booth at booth malls, and that she was not responsible for expenses for the booth.

Under the agreement, Defendant paid Plaintiff solely on commission, so if Plaintiff did not make any sales, she received nothing from Defendant. Defendant's materials suggest that for the first fourteen sales that a new associate made, she would receive an 18% commission. Docket No. 65-3. As the associate made more sales,

her commission would increase. Id. After an associate made a certain number of sales, she would have the opportunity to recruit new associates and earn commissions off of their sales. Id.

Defendant's associates' handbook defines the different types of sales associates, including a category described as independent contractors. Docket No. 73-2. The handbook states that all associates are required to work either 8:00 a.m. to 5:00 p.m. or 9:00 a.m. to 6:00 p.m., five days a week, with a one-hour lunch break. Id. The handbook also indicates that Defendant keeps track of the absences and late arrivals of associates, which are taken into consideration in performance evaluations. Id.

Immediately after Plaintiff filled out the sales contract, Alers instructed her to go to Plaza Las Américas, a mall in Hato Rey, Puerto Rico, so he could train her in how to work the booth there. Plaintiff worked five or six hours that day. For the next eight weeks, Plaintiff worked more than ten hours a day, seven days a week. She never requested or received overtime payments for this work. Plaintiff was almost always working with Alers and one or two other associates. Alers was responsible for establishing the work schedules at the malls, and training Plaintiff and several other sales associates.

Plaintiff alleges that, from her first full day of work, Alers made unwelcome sexual advances toward her. He attempted to kiss her,

touched her leg, called her his "sweet black babe," told her she was hot, and stared at her buttocks and breasts. Plaintiff states that at some point, she spoke with Alers' supervisor about this behavior. Shortly thereafter, on May 11, 2005, Alers fired Plaintiff, with the stated reason that she had refused to pick up a check from a client. However, Plaintiff maintains that she was fired for refusing Alers' sexual advances and/or that Alers made her work environment so unpleasant that she was forced to quit.

Plaintiff filed a complaint before the Anti-Discrimination Unit of the Department of Labor of Puerto Rico ("ADU"), the administrative agency in Puerto Rico that reviews employment discrimination charges, and the federal Equal Employment Opportunity Commission ("EEOC"). On September 6, 2006, at Plaintiff's request, the ADU issued a letter informing Plaintiff that she had the right to sue Defendant. The ADU forwarded Plaintiff's request to the EEOC. On November 20, 2006, the EEOC issued a letter informing Plaintiff that she had the right to sue Defendant within ninety days of receipt of the letter.

On November 16, 2007, Plaintiff filed the present diversity complaint in federal district court. Docket No. 1. Defendant moved for summary judgment on August 25, 2008, asserting that (1) Plaintiff was an independent contractor and, therefore, not covered by Puerto Rico anti-discrimination laws, and (2) Defendant did not discriminate against Plaintiff. Docket No. 24. Plaintiff opposed on September 9,

2008, Docket Nos. 26, 27, Defendant replied on September 26, 2008, Docket No. 62, and Plaintiff surreplied on September 30, 2008, Docket No. 64. Plaintiff filed an amended complaint on September 29, 2008. Docket No. 60.

**II.**

**Summary Judgment Standard under Rule 56(c)**

We grant a motion for summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is "genuine" if it could be resolved in favor of either party, and "material" if it potentially affects the outcome of the case. Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 19 (1st Cir. 2004). The moving party carries the burden of establishing that there is no genuine issue as to any material fact; however, the burden "may be discharged by showing that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 331 (1986). The burden has two components: (1) an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and (2) an ultimate burden of persuasion, which always remains on the moving party. Id. at 331.

In evaluating a motion for summary judgment, we must view the record in the light most favorable to the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). However, the non-moving party "may not rely merely on allegations or denials in its own pleading; rather, its response must . . . set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

## III.

## Analysis

Plaintiff alleges that Alers, an employee of Defendant, subjected her to a hostile work environment and fired her for failing to submit to his sexual advances. Docket No. 60. Defendant argues that we should grant summary judgment in its favor because (1) Plaintiff was an independent contractor and not an employee of Defendant, and (2) Plaintiff cannot establish that she was sexually harassed. Docket No. 24-1. We address these arguments in turn.

### A. Independent Contractor Status

Defendant argues that Plaintiff was an independent contractor and, thus, may not invoke the protection of Laws 17 and 69. Docket No. 24-1. Plaintiff acknowledges that these anti-discrimination laws do not extend to independent contractors, but asserts that she had a covered employer-employee relationship with Defendant. Docket No. 26.

Law 17 prohibits sexual harassment in employment. 29 L.P.R.A. § 155. Law 69 prohibits gender discrimination in employment. 29

L.P.R.A. § 1321. Law 17 states that a protected employee is "any person who works for an employer and receives compensation therefor, or any job applicant. For the purposes of [this provision], the term employee shall be interpreted in the broadest sense possible." § 155a. Law 69 does not contain the same term; however, "Law 17 and Law 69 are . . . to be interpreted in pari materia." Valentin-Almeyda v. Municipality of Carolina, 447 F.3d 85, 102 n.20 (1st Cir. 2006).

In determining whether a party is an employee or an independent contractor under Puerto Rico law, we look to several factors, including (1) the form of the employment contract; (2) whether the work was full or part time; (3) whether the contract provides for vacation time, sick leave, or a retirement program; (4) the extent and nature of control the putative employer has over the worker; (5) the form of payment; (6) the ownership status of any equipment; (7) whether the worker has an independent business that contracts with the putative employer; and (8) the right of both parties to terminate the relationship at any time. López v. Nutrimix Feed Co., Inc., 27 F. Supp. 2d 292, 298 (D.P.R. 1998) (citing Rivera v Hosp. Universitario, 762 F. Supp. 15, 17 (D.P.R. 1991)); Lugo v. Matthew Bender & Co., 579 F. Supp. 638, 641-42 (D.P.R. 1984) (citing, inter alia, Avon Products, Inc. v. Secretario del Trabajo, 106 P.R. Dec. 803 (1977); Nazario v. González, 101 P.R. Dec. 569 (1973)). The most

important factor is the control the employer has over the work performed. López, 27 F. Supp. 2d at 298.

Here, the factors point in different directions. The contract stated that Plaintiff was an independent contractor and did not provide for vacation time, sick leave, or retirement, and provided that Plaintiff was paid purely on commission. Docket No. 65-2. These factors point to a finding that Plaintiff was an independent contractor. See López, 27 F. Supp. 2d at 298; Lugo, 579 F. Supp. at 641-42. However, the parties could not terminate the relationship without giving thirty days' notice, Plaintiff worked full time or more than full time, and she did not have an independent business that contracted with Defendant. See Docket No. 65-2. These factors point to a finding that Plaintiff was an employee. See López, 27 F.Supp.2d at 298; Lugo, 579 F. Supp. at 641-42. The ownership status of the equipment used is unclear. The contract states that sales representatives are responsible for "paying the booth shifts [they are] willing to cover," see Docket No. 65-2; however, Plaintiff maintains that she did not have to pay to rent the booth space.

Finally, as to the amount of control Defendant had over Plaintiff, the evidence is inconclusive. Defendant argues that Plaintiff had complete control over her hours; however, Plaintiff states that Alers assigned her to work at various booths, determined her work schedule, and was always working with her. Defendant's

associate's handbook states that all associates are required to work either 8:00 a.m. to 5:00 p.m. or 9:00 a.m. to 6:00 p.m., five days a week, with a one-hour lunch break. See Docket No. 73-2. The handbook also indicates that Defendant keeps track of the absences and late arrivals of associates, which are taken into consideration in performance evaluations. Id. Taken with Plaintiff's allegations about the supervision by Alers, this manual indicates that Defendant had a substantial amount of control over Plaintiff's day-to-day work. However, the record does not establish to what extent Defendant actually followed the protocol set forth in the manual.

We find that issues of fact remain as to the extent and nature of the control Defendant had over Plaintiff and the ownership status of Defendant's booths. Since the most important factor is the control the Defendant had over the work performed, see López, 27 F. Supp. 2d at 298, these factual issues could be material to our determination of whether Plaintiff was an employee or an independent contractor. Therefore, Defendant is not entitled to summary judgment on this issue.[1]

[1] To the extent that Defendant argues for summary judgment on the grounds that Alers is himself an independent contractor, and not an agent, of Defendant, we note that there is even less evidence in the record about the terms and conditions of Alers' employment.

**B. Sexual Harassment**

Defendant contends that we should grant summary judgment in its favor because Plaintiff cannot establish that she was sexually harassed under either a quid pro quo or hostile work environment theory. Docket No. 24.

Law 17 defines sexual harassment in employment as "any type of undesired sexual approach, demand for sexual favors and other verbal or physical behavior of a sexual nature" when (1) submission to the conduct becomes a condition of employment; (2) submission to or rejection of the conduct becomes grounds for a decision regarding the person's job; or (3) the conduct unreasonably interferes with the persons's work, or creates an intimidating, offensive, or hostile work environment. 29 L.P.R.A. § 155b. The first two types constitute quid pro quo harassment, while the third is hostile environment harassment. Hernández Loring v. Universidad Metropolitana, 186 F.Supp.2d 81, 85-86 (D.P.R. 2002) ("Hernández II"). We note that "the substantive law of Puerto Rico on sexual harassment appears to be aligned . . . with Title VII law, and Title VII precedents are used freely in construing commonwealth law." Hernández Loring v. Universidad Metropolitana, 233 F.3d 49, 52 (1st Cir. 2000) ("Hernández I").

**1. Quid Pro Quo**

Defendant argues that Plaintiff cannot establish quid pro quo harassment because she admits that she was fired for failing to complete an assigned task, not for refusing Defendant's sexual advances. Docket No. 24-1.

In a quid pro quo case, an employer may be liable where a supervisor punishes a subordinate for refusing to comply with sexual demands. See Hernández I, 233 F.3d at 52. A plaintiff must show that a tangible job benefit or privilege was conditioned on her submission to unwelcome sexual advances. Hernández II, 186 F. Supp. 2d at 86.

Plaintiff asserts that, shortly after she complained about Alers' behavior to a supervisor, Alers fired her for objecting to his continued sexual advances. Docket No. 65-6. Defendant counters that Plaintiff was fired for failing to pick up a check from one of her clients. Docket No. 24-1. Defendant attempts to show that this charge is undisputed using Plaintiff's own deposition testimony reciting the reason that Alers gave for firing her. See Docket Nos. 24-1, 24-2, 65-6. In the deposition, Plaintiff stated that Alers told her she was fired for failing to pick up a check. Docket No. 65-6. However, later in the deposition, she insisted that Alers' explanation was pretextual; in fact, she stated, "[Alers] had made sexual advances to me, and . . . because I did not give in to his wishes, then he fired me without justification." Id. Based on our reading of this

testimony, Plaintiff does not agree to Defendant's version of events. Accordingly, there exists a triable issue of material fact as to why Plaintiff was fired and, therefore, whether she suffered quid pro quo sexual harassment.

**2. Hostile Work Environment**

Defendant asserts that Plaintiff cannot establish that she was subjected to a hostile work environment because her recollections of the harassment lack specificity as to the details of the alleged incidents and are in apparent conflict with other facts in the record. Docket No. 24-1.

In a hostile work environment case, the plaintiff must allege "more than a mere isolated incident of sexual harassment." Rivera v. DHL Global Forwarding, 536 F. Supp. 2d 148, 154 (D.P.R. 2008) (citing Puerto Rico cases). We consider the nature of the offensive conduct, the frequency and intensity of the conduct, the context in which it occurs, its duration, and the victim's own actions and circumstances. Id. The summary judgment standard "polic[es] the baseline for hostile environment claims." Billings v. Town of Grafton, 515 F.3d 39, 50 (1st Cir. 2008) (quoting Pomales v. Celulares Telefónica, Inc., 447 F.3d 79, 83 (1st Cir. 2006)) (internal quotation marks omitted). However, whether a hostile work environment exists is generally to be determined by the finder of fact. Id. at 47 n.7, 50.

An employer can be held liable for (1) its own actions, (2) those of its agents or supervisors, or (3) the actions of employees, if the employer knew or should have known of the offensive conduct. Rivera, 536 F. Supp. 2d at 154.; see 29 L.P.R.A. § 155d. A plaintiff can establish employer liability based on the actions of non-supervisory employees by showing that the employer directly knew of the conduct or that it had constructive knowledge through its agents or supervisors. Rivera, 536 F. Supp. 2d at 154.

Plaintiff alleges that, from her first full day of work, Alers made unwelcome sexual advances toward her. He attempted to kiss her, touched her leg, called her his "sweet black babe," told her she was hot, and stared at her buttocks and breasts. She asserts that she and Alers were constantly together during the time that she worked for Defendant. As Defendant notes, Plaintiff is vague as to the exact dates of each incident; nonetheless, she maintains that the harassment was ongoing during the period that she worked for Defendant. These alleged remarks and comments, if true, would surely suffice to establish the existence of a hostile work environment. See Billings, 515 F.3d at 48 (stating that "for a male supervisor to stare repeatedly at a female subordinate's breasts is inappropriate and offensive, not merely unprofessional," and denying summary judgment where such conduct occurs in connection with other offensive actions).

Defendant contends, however, that it has presented evidence that undercuts Plaintiff's version of the facts. Docket No. 24-1. Defendant asserts that Plaintiff and Alers made sales to people residing in remote areas of Puerto Rico, indicating that Plaintiff and Alers did not spend as much time together as Plaintiff claimed, and demonstrating that certain instances of harassment could not have occurred on the dates alleged. Id. For example, Defendant states that Plaintiff testified to working in a booth at Plaza Las Américas on the date of the first incident of sexual harassment, but that her sales indicate that she made a sale on that date to a person residing in Río Grande, Puerto Rico, while Alers made a sale on that same date to a person residing in Dorado, Puerto Rico. Id. at ¶ 60. Defendant cites several similar apparent discrepancies in the sales record to argue that the alleged harassment could not have occurred. Id. However, this circumstantial evidence does not negate Plaintiff's version of the facts. Because Plaintiff and Alers often worked at booths in malls, they could have made sales to people from all over the island in a single day. Similarly, Plaintiff could have accompanied Alers while he made sales, even though she did not record any sales herself. Defendant's evidence does not foreclose the possibility that Plaintiff and Alers spent a substantial amount of time together, during which he had the opportunity to harass her.

We find that issues of material fact remain as to (1) whether Alers made the harassing comments and gestures to Plaintiff; (2) whether the alleged offensive conduct was severe or pervasive enough to create a hostile work environment; and (3) whether Alers was an agent or supervisor of Defendant for liability purposes or whether Alers was a non-supervisory employee and Defendant had actual or constructive knowledge of Alers' alleged conduct. Accordingly, we deny Defendant's motion for summary judgment on the hostile work environment claim.

**IV.**

**Conclusion**

For the reasons stated herein, we **DENY** Defendant's motion for summary judgment, Docket No. 24.

**IT IS SO ORDERED.**

San Juan, Puerto Rico, this 24th day of February, 2009.

s/José Antonio Fusté
JOSE ANTONIO FUSTE
Chief U.S. District Judge